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Held at Headquarters, New York, on Monday, 3 November 1997, at 3 p.m.

Chairman: Mr. Tomka ..... (Slovakia)

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The meeting was called to order at 3.05 p.m.

Agenda item 147: Report of the International Law Commission on the work of its forty-ninth session (continued) (A/52/10)

1. The Chairman said that the meeting would be devoted to consideration of chapter IV of the report of the International Law Commission (A/52/10) on nationality in relation to the succession of States.

2. Mr. Yamada (Japan) said that his Government would carefully study the draft articles on nationality and submit its written comments by 1 January 1999. His delegation would therefore confine itself to a few preliminary observations. It generally agreed with the structure as well as the principles enunciated in the draft articles, but believed it would be better to turn them into a declaration rather than a convention.

3. The "presumption of nationality" mentioned in article 4 was based on the concept of habitual residence. As such, the article did not create any complication, but throughout the draft articles the concept of habitual residence played a dominant role in attribution of nationality. While "habitual residence" constituted a very close link between a natural person and a State, there were also ethnic, linguistic, religious, cultural, social and political factors which were often very important in the case of succession of States. Thus articles 24 and 25, which made nationality dependent on habitual residence, certainly covered most cases, although not those of persons who, while retaining habitual residence in the successor State, had other vital links with the predecessor State, and vice versa. The problem might not be properly solved by the right of option, and his delegation wished to examine the matter further.

4. Article 12 enshrined jus soli for children born to persons concerned who had not acquired any nationality after the succession of States. However, his delegation wondered whether provision should be made for adjustment in the case of children whose parents subsequently acquired the nationality of the State to which they were linked by jus sanguinis.

5. His delegation had no disagreement with articles 11 and 13 regarding family unity, which was an important element of human rights, and the status of habitual residents. While recognizing that those issues were important for nationality, his delegation felt that it might be appropriate to remove them from the main body of the draft articles.

6. Mr. Chimimba (Malawi) explained that his Government would submit more detailed comments at a later stage and said that he would confine himself to a few preliminary observations. His delegation had been struck by the fact that some of the provisions of the draft articles did not possess the usual characteristics of a declaration; they seemed to fit more naturally into a draft convention. The form that the draft articles would take should be resolved as soon as possible so that the necessary fine tuning could be made during the second reading. It was also possible that, provided the necessary technical adjustments were made, the 18 articles containing the provisions would be sufficient for a declaration.

7. Welcoming the fact that the International Law Commission had decided to draft a preamble, his delegation stressed that the success of the project would depend on the balance that was struck between respect for the sovereignty of States and the development of the right to a nationality since the advisory opinion in the case concerning Nationality Decrees Issued in Tunis and Morocco of 1923.

8. Likewise, his delegation accepted the general thrust of article 3 while believing that it might be useful to strengthen it. Article 3 was linked to article 10 (Respect for the will of persons concerned), article 14 (Non-discrimination) and article 15 (Prohibition of arbitrary decisions concerning nationality issues).

9. Insofar as territory was linked to population, it was difficult to imagine any other logical propositions than those contained in articles 1 and 3. When the draft articles were considered in detail, Malawian experts would be careful to ensure that an appropriate balance was struck so as to avoid creating statelessness, dual nationality, or the fortuitous acquisition or attribution of nationality.

10. His delegation took note of the fact that the Commission had decided not to include a draft provision on newly independent States in part II, but believed that it would nevertheless have been useful if a text had been submitted for the consideration of the Sixth Committee.

11. Mr. Diaz (Costa Rica) said that his delegation welcomed the draft articles as a whole, particularly the importance that had been attached to human rights and the right to a nationality which underlay articles 3, 4 and 15, which were the true cornerstones of the draft.

12. The wording should make clear that article 10 (Respect for the will of persons concerned) only applied to rare cases. In addition, the draft did not rule out possible multiple nationality which was the standpoint that best squared with modern practice, since some legal systems allowed it while others did not.

13. According to article 12, "a child of a person concerned, born after the date of the succession of States, who has not

acquired any nationality, has the right to the nationality of the State concerned on whose territory that child was born". But it was also necessary to provide for cases in which parents who exercised their option after the birth of the child chose a nationality other than the child's. In such cases, article 12 notwithstanding, the child should have the right to acquire the nationality adopted by its parents. The wording of article 12 should be changed accordingly.

14. Article 18, paragraph 2, dealt with situations of statelessness which might result from discriminatory legislation, arbitrary decisions or negligence on the part of the person concerned. The issue therefore involved finding a remedy for a violation of the right to a nationality, and his delegation did not share the view of other delegations which opposed the inclusion of article 18 on the grounds that the matter fell within the exclusive competence of the successor State and should be settled on the basis of national legislation alone.

15. With regard to article 27, it was not clear what was meant by the phrase "without prejudice to the right to a nationality of persons concerned". His delegation could not agree that, to avoid cases of statelessness, the principles included in the draft should apply also to cases of succession of States not in conformity with international law. Cases of military occupation or illegal annexation were regulated by the principles laid down in the fourth Geneva Convention, which prohibited any modification of the legal situation of persons and territories under occupation. Those principles, which were inviolable, even when the persons concerned had expressed wishes to the contrary, could be difficult to apply, particularly in cases of prolonged occupation. It would therefore be appropriate to review the wording of article 27 from that angle.

16. Mr. Fozein (Cameroon) said that recent events had highlighted the conflicts between the exclusive and discretionary competence of States in the area of attribution of nationality and the imperative need for the protection of human rights. The sovereign prerogative of States in that respect must be in line not only with international custom but also with recent developments in positive international law. The establishment in the draft articles of the right to a nationality as one of the fundamental rights of the human person therefore represented an adaptation of that right to the requirements of protection of human rights, particularly in view of the legal uncertainties arising from the disparities among State laws and practices in the area of the attribution of nationality in cases of succession of States.

17. That question was not an isolated issue of international relations since it had direct implications for the cohesion and stability of States and, consequently, for international peace and security. Any codification of the right to a nationality in relation to the succession of States must therefore ensure that the legitimate interests of individuals were reconciled with the no less legitimate interests of States. That view was shared by the Commission, as was demonstrated, in particular, by the neutrality of its draft articles with regard to the policies of States in cases of double or multiple nationalities. The obligation laid down in article 17, namely that States must exchange information and consult each other in order to prevent any detrimental effects of the succession of States on the nationality of persons, or seek appropriate solutions by negotiation or through agreement, was in the same spirit.

18. It was commendable that the Commission had taken a realistic approach by combining the right to a nationality with objective criteria for its attainment, namely the criteria of "habitual residence" or of "effective link", so as to make the right applicable in practice. Thus it was only because of its relevance in terms of the habitual residence of the person concerned that the presumption of nationality set forth in article 4 of the draft articles was an innovative solution to the cases of statelessness which could result directly from the succession of States.

19. The Commission, however, seemed to have lost sight of the legitimate interests of States in prohibiting them from making any discrimination in the attribution of nationality or in recognition of the right of option "on any ground". Because of its absolute nature, that requirement in article 14 was clearly a very broad limitation on the competence accorded to States in respect of nationality. However, faced with the resurgence of fanaticism and associated extremism which, as had been seen, could go as far as ethnic cleansing, the Commission had been wise to include in the draft articles a provision clearly laying down the principle of non-discrimination. In order to reconcile that concern with the legitimate interests of States, the extent of the illegality of the discrimination concerned should be clearly defined.

20. The wording of article 18, paragraph 2, which allowed third States to treat persons who had become stateless as a result of a succession of States as nationals of the State concerned whose nationality they would be entitled to acquire or retain if such treatment was beneficial to them, was equally controversial. That too was an encroachment on the competence of the State in the area of nationality, especially when the situation of the persons concerned was not attributable to that State. The spirit of that provision, as described in the relevant commentary of the Commission, allayed his delegation's concerns to some extent, since the objective was not only to prevent the statelessness which might result from discriminatory legislation or arbitrary

decisions, but also to protect the persons concerned against possible expulsion to the State of which they would have been nationals, or to enable them to receive favourable treatment identical to that granted to nationals of that State. It would therefore be highly desirable for the commentary on that article, which his delegation fully supported, to be specifically reflected in the disputed provision.

21. His delegation questioned the value of article 12, which granted the nationality of the place of birth to a child born after the date of the succession of States, even though the child benefited by extension from the nationality of his parents under the presumption of nationality in article 4. If that presumption was not applicable for one reason or another, the national legislation of the State in the territory of which the child had been born should be left to settle the matter in accordance with article 3, which provided that States concerned should take all appropriate measures to prevent statelessness as a result of the succession of States. Moreover, if article 12 was applied at a time when the parents had not yet acquired any nationality and subsequently, on the basis of their right of option or any other consideration, they acquired a nationality other than that of their child, there could be a situation of break-up of the family because of nationality, although one of the objectives of the right to a nationality was precisely to achieve unity of the family, as was clear from article 11.

22. With regard to the exclusion from consideration of cases involving formation of States as a result of decolonization, his delegation, like many others, hoped that the Commission would abide by the terms of the non-restrictive mandate accorded to it by the General Assembly, particularly since the status of habitual resident, which had a somewhat tenuous link with the subject, had nevertheless been included. In view of the broad scope of the draft articles submitted for its consideration, the Committee would undoubtedly have benefited from clarification about the reasons for that exclusion. There was certainly a gap there, otherwise the Fourth Committee, which was specifically responsible for questions of decolonization, would no longer serve any purpose. In the second reading, therefore, the impression should be removed that there was a selective focus on seeking solutions to concerns which were geographically restricted, even though the challenge to be met was global.

23. His delegation shared the Commission's view that the text it had approved in first reading should take the form of a declaration, pending a decision on its final form in the light of the written comments to be made by States. In view of the importance of the subject and of its obvious implications, his Government would submit to the Commission a more detailed analysis of the 27 articles and of the draft preamble.

24. Mr. Choung Il Chee (Republic of Korea) said that his delegation endorsed the overall thrust of the draft articles on Nationality of natural persons in relation to the succession of States, which was to ensure "greater juridical security for States and for individuals". It welcomed the fact that the draft articles equated the right to a nationality with human rights and that article 1, which set forth that right, was considered in the commentary as "a key provision, the very foundation of the ... draft articles". The draft articles covered many issues relating to nationality, but the most important one was the exercise of the right of option. A number of European powers had guaranteed that right when the decolonization of Asia had begun in 1945. In that connection, he recalled the precarious situation of many Koreans who had suddenly lost their nationality after the Second World War.

25. Article 14, which dealt with non-discrimination against persons who acquired a new nationality, gave no indication of what happened after that nationality was acquired. However, experience showed that persons who obtained a new nationality were the victims of discrimination, particularly with respect to employment. Accordingly, the right of persons to a nationality must be protected both before and after it was acquired. His delegation therefore suggested adding a phrase at the end of article 14, stipulating that States should ensure that the principle of non-discrimination applied to all persons, including those who acquired a nationality through the succession of States.

26. Article 18, paragraph 1, referred to the concept of "effective link". That seemed to be an allusion to the principle of "genuine link", set forth in the decision of the International Court of Justice in the Nottebohm case. Moreover, paragraph 1 of the commentary referred to the concept of "sufficient link". It would be preferable to retain the concept of "genuine link", which was recognized at the international level, as evidenced by article 5, paragraph 1, of the 1958 Geneva Convention on the High Seas and article 91, paragraph 1, of the 1982 United Nations Convention on the Law of the Sea.

27. His delegation hoped that the draft articles would help to avoid the recurrence of the difficulties experienced by persons who had lost their nationality in the aftermath of the Second World War. It endorsed the content of the draft articles and supported the idea of presenting the results of the Commission's work in the form of a General Assembly declaration.

28. Mr. Pastor Ridruejo (Spain), referring to chapter V of the report under consideration, on reservations to treaties, said he would address the question of the form which the results of the study of the International Law Commission

should take. In 1995, his delegation had been in favour of a set of model clauses. Two years later, it believed that such clauses should be preceded by a guide to practice for States and international organizations. It welcomed the fact that, in the current phase of its work, the Commission had limited itself to adopting a set of Preliminary Conclusions regarding two particularly interesting questions: the applicability of the Vienna regime to human rights treaties and the role of monitoring bodies in respect of reservations.

29. In 1995, his delegation had observed that reservations to human rights treaties were not desirable and that the integrity of those treaties must be preserved. Like the Special Rapporteur, it recalled that those principles had already been cited in the advisory opinion of the International Court of Justice on reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, a quintessential human rights treaty. It therefore supported Preliminary Conclusions 2 and 3.

30. His delegation fully shared the Special Rapporteur's views on the role of monitoring bodies: those bodies could and must assess the admissibility of reservations when it was necessary for the exercise of their functions. That should be clearly expressed in Preliminary Conclusions 4, 5 and 6.

31. Going back to the chapter on nationality in relation to the succession of States, he praised the quality of the report prepared by the Special Rapporteur. With regard to the form that the results of the Commission's work should take, it seemed to him that the Commission should establish a guide to assist States in resolving problems of nationality, particularly in elaborating the legislation mentioned in article 5. As for the substance, all of the provisions of chapter V made perfect sense, particularly article 18, which ensured that only an effective link was opposable to other sovereign States.

32. Turning to diplomatic protection, a topic on which the Commission was requesting guidance, he said that it was premature at that stage to decide on the final form to be given to the results of its work. Moreover, the Commission had wisely decided that the topic should not extend to damage arising from direct injury caused by one State to another. Diplomatic protection would address only indirect harm (caused to natural or legal persons whose case was taken up by a State). It was also prudent to confine the topic to secondary rules of international law. As to the content of the topic, the list of questions drawn up by the Commission was completely satisfactory.

33. Concerning unilateral acts of States, another topic proposed for consideration by Member States, his delegation approved of the Commission's decisions, in particular, on ruling out the question of the law applicable to resolutions of international organizations and those acts of States governed by the law of treaties. The General Scheme proposed by the Commission for the study of the topic was complete and well conceived.

34. Lastly, his delegation wished to invite the Commission to address a very important topic: the limits imposed by international law on the extraterritorial scope of certain national laws.

35. Mr. Lavalle (Guatemala) said that the Commission had adopted the text on first reading in the form of a declaration of the General Assembly. The provisions contained in that type of declaration usually became rules of international law. It seemed that the drafters had wanted to make the second part of the text into a sort of guide for the application of the provisions of the first part, which gave the whole text a hybrid feel. It would thus be more appropriate for the General Assembly to adopt the text in the form of guidelines.

36. He had some amendments which might improve the proposed text. Article 1 and article 2 could be inverted. Paragraph 3 of article 10 appeared superfluous and should be dropped. In article 19 the phrase "in specific situations" should be replaced by "as appropriate". Article 27, which appeared in section 4 of part II, should be transferred to the end of part I. The phrase "a succession of States occurring in conformity with international law" gave the impression that there might be a succession which was not in conformity with international law; it was questionable whether such a thing was possible.

37. Mr. Pellet (Chairman of the International Law Commission) introduced chapter V of the Commission's report entitled "Reservations to treaties". As Special Rapporteur for the topic, he had submitted to the Commission his second report, which contained two chapters. The first dealt with the Commission's future work on the topic and contained a provisional general outline thereof. The second dealt with the question of the unity or diversity of the legal regime for reservations to treaties and the specific questions raised by human rights treaties.

38. Chapter I of the second report had a dual purpose. First, it indicated the points on which, in the light of the discussions in 1995 in both the Commission and the Committee, there appeared to be general support for the Special Rapporteur: firstly, the need to preserve the achievements of the Vienna regime, which had demonstrated its effectiveness and adaptability; secondly, the persistence of ambiguities and uncertainties which the Vienna regime could not resolve, such as the effects of reservations and objections thereto, or even the definition of reservations and interpretative declarations;

thirdly, the need for the Commission to produce a guide to practice in respect of reservations which would furnish States and international organizations with guidelines, it being understood that such a guide would preserve the achievements of the Vienna Convention. It would take the form of draft articles with commentaries, accompanied by model clauses, if necessary. Chapter I went on to define the scope of the study and proposed a provisional outline for its conclusion within a reasonable period of time, probably four years.

39. Chapter II of the report addressed the crucial question of the unity or diversity of the legal regime for reservations to treaties and more particularly in relation to human rights treaties. A first conclusion from the analysis both of the history and of the application of the Vienna system showed that it was intended to apply universally to all treaties. The second conclusion, stemming from the first, was that the Vienna regime was also applicable to the special category of normative treaties constituted by human rights treaties. There was no convincing basis either de lege lata or de lege ferenda for a specific regime. If problems persisted, they were due to the lacunae and ambiguities of the Vienna regime as such and not to its application to human rights treaties.

40. The role of the treaty monitoring bodies in regard to reservations had lately been much debated. Recent developments, in particular, General Comment No. 24 of the Human Rights Committee (CCPR/C/21/Rev.1/Add.6) had led to the emergence of two entirely opposed views. One was that the State parties alone were competent to decide on the admissibility and validity of reservations. The second was that the monitoring bodies were not only competent to decide whether reservations were permissible but could also draw all the consequences of that determination, including the fact that the reserving State was bound by all the provisions of the treaty, even by those in respect of which it had entered the reservation.

41. The Special Rapporteur found neither of those extreme views satisfactory and had proposed two considerations in devising a more satisfactory solution: human rights bodies could and should assess whether reservations were permissible when that was necessary for the exercise of their functions, i.e. the monitoring of the implementation of the treaty; however, in principle they could not draw any consequences from such an assessment with regard to participation or non-participation in the treaty; that was for the State to decide, in exercise of its sovereign powers.

42. However, in his oral report in 1997 the Special Rapporteur had recognized that that solution might not be appropriate for such bodies as the European Court of Human Rights and the Inter-American Court, which operated in communities which were vastly more integrated and united than international society as a whole was at present.

43. The Commission had had a fruitful and interesting debate on the issue. Most of its members had confirmed that it was necessary to preserve the achievements of the Vienna Conventions, for despite their ambiguities they worked remarkably well, thanks to their flexibility and adaptability. In that connection several members had stressed the highly political nature of the question, and the Commission had noted its technical complexity. It had felt in particular that the concept of the "object and purpose" of a treaty still had to be clarified, as did the consequences of a finding of inadmissibility. The possible reformulation of an impermissible reservation presented many procedural and substantive complexities to which the Commission should give further thought, for instance the question of the effects of prohibited reservations and the effects of acceptances of and objections to such reservations which might lead to the same result, as well as the delicate question of reservations to the provisions of a treaty restating a rule of customary law or even of jus cogens.

44. The Commission had also felt that the problem of the definition of reservations and interpretative declarations and the problem of the nature and effects of such declarations that were obviously contrary to the treaty should be dealt with in greater depth. Concerning the general outline and the form of the results of the study, several members had reaffirmed that they favoured a guide to practice which filled the gaps of the Vienna regime.

45. Two different views had been expressed on the regime of reservations to normative treaties, including human rights treaties. According to one view, supported by many members of the Commission, the regime established by the Vienna Conventions of 1969 and 1986 was generally applicable to all multilateral treaties, including human rights treaties. According to the view supported by other members of the Commission, the question of the applicability of the Vienna regime to reservations to human rights treaties was a controversial matter which could not be settled until the end of the study, since the very unity of the legal regime of reservations to treaties was not satisfactory and constituted a major lacuna in the Vienna Conventions. However, the problems to which reservations contrary to the object and purpose of the treaty gave rise constituted a gap per se in the Vienna Conventions and were not confined to the field of human rights.

46. Concerning the role of monitoring bodies in respect of reservations, it had been pointed out that developments in the field of human rights since 1969 and the gradual increase in

the authority of such bodies had led to the expansion of their functions with respect to determination of the admissibility of reservations, especially at the regional level. That practice could not be transposed to bodies at the global level without decision-making power, since such bodies could only make recommendations.

47. Other members had stressed that it was for States alone to determine the admissibility of reservations. It had been suggested that the possibility of complementarity of the monitoring by treaty bodies and by States should be explored. Several members had stressed the advisability of closer cooperation between States and monitoring bodies on that matter.

48. With regard to the consequences of the findings of monitoring bodies, some members had stressed that the pure and simple severing of the impermissible reservation from the State's consent to be bound by the treaty, advocated by some monitoring bodies, posed many difficulties. Several members had agreed that monitoring bodies should be competent to assess the admissibility of reservations in the context of the their function of monitoring the implementation of the treaty, but that they could go no further and regard the reservation as null and void or draw the consequences of such a finding. However, other members considered that the Commission's position towards the practices of monitoring bodies should be of strict neutrality in view of their autonomy and their special features.

49. It was against that background that the Commission had referred the proposed draft resolution to the Drafting Committee. Having considered the report of the Drafting Committee, the Commission had adopted 12 paragraphs in the form of preliminary conclusions on reservations to normative multilateral treaties, including human rights treaties. The term "preliminary" had been used in order not to prejudge any future orientations or conclusions of the Commission on the topic pending feedback from other relevant organs. The opening paragraph of the conclusions was of a general character. He described the background and reasons for the text.

50. Paragraph 1 reiterated the view of the Commission on the necessity of preserving the Vienna regime on reservations and on the particular importance of the criterion of "object and purpose" of the treaty for determining the admissibility of reservations. Paragraphs 2 and 3 confirmed the principle of the general applicability of the Vienna regime of reservations to all treaties, including human rights treaties.

51. Paragraph 4 expressed the idea that the establishment of monitoring bodies gave rise to legal questions that had not been envisaged at the time of the drafting of the reservations provisions of the Vienna treaties. It reflected also the idea that those bodies, because of the nature of their functions, could engage in the evaluation of the reservations involved precisely with a view to appreciating their true purport and effect.

52. Paragraph 5 was a statement concerning the competence of the monitoring bodies, where the treaties establishing them were silent, to comment upon and express recommendations with regard to the admissibility of reservations in order to carry out the functions assigned to them.

53. Paragraph 6 addressed the issue that the competence of the monitoring bodies did not exclude the traditional modalities of control by the Contracting Parties, on the one hand, in accordance with articles 19 to 23 of the Vienna Conventions and, as appropriate on the other hand, by the organs for settling any dispute that might arise concerning the interpretation or implementation of the treaties. Paragraph 7 suggested – for the future drafters of treaties – that specific clauses should be provided for in normative multilateral treaties, including human rights treaties, or that protocols to existing treaties should be elaborated if States sought to confer competence on the monitoring body to appreciate or to determine the admissibility of a reservation.

54. Paragraph 8 pointed out that those bodies, in the exercise of their power to deal with reservations, could not exceed that resulting from the powers given to them in other respects; in other words, a body which could only make recommendations as to how States parties should comply with their treaty obligations could not exercise decision-making power in the area of reservations. Paragraph 9 called upon States to cooperate with monitoring bodies and give due consideration or effect to any findings that they made.

55. Paragraph 10 stated that it was for the reserving States to take action in the event of inadmissibility of a reservation. Some of the actions that a reserving State might take also were enumerated, but the list was not exhaustive. Paragraph 11 expressed the hope that the principles the Commission had enunciated would help to clarify the reservations regime applicable to normative multilateral treaties, particularly in the area of human rights.

56. Finally, paragraph 12, which appeared to be a safeguard clause of far-reaching effect, emphasized that the conclusions adopted by the Commission should not affect the practices and rules developed by monitoring bodies within regional contexts.

57. He invited comments on the preliminary conclusions by the members of the Sixth Committee. The Commission also was interested in receiving comments from the monitoring bodies set up by the relevant human rights

treaties, to which the preliminary conclusions had been transmitted. Lastly, he thanked all States and international organizations that had responded to the questionnaire on reservations to treaties which had been sent to them. He thanked the 31 States and 19 international organizations which had submitted their answers to the questionnaire and urged those which had not yet done so to provide their answers so that work on the topic could proceed.

The meeting rose at 5 p.m.